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Reserve Bank of India

Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2017

Reserve Bank of India (“RBI”) vide its *Circular dated June 13, 2017* has provided has provided for amendments in the *Foreign Exchange Management (Export of Goods & Services) Regulations, 2015* (“**FEMA Export Regulations 2015**”). These amendments are to be called the Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2017 . The following amendments have been made:

a. Amendment of the Regulation 6

Sub-regulation (C) reads as

C. Duplicate Declaration Forms to be retained with Authorised Dealers. On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF and SOFTEX and Exchange Control copies of the shipping bills shall be retained by the Authorised Dealers.

Amendment-

In sub-regulation (C), after the words, “viz. EDF and SOFTEX”, the words “and Exchange Control copies of the shipping bills” shall be deleted.

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SEBI

Recording of Non Disposal Undertaking in the Depository System

Securities and Exchange Board of India (“SEBI”) vide its *Circular dated June 14, 2017* (“**NDU Registration Circular**”) provided guidelines for recording of Non Disposal Undertaking (“**NDU**”) in the Depository System. It is observed that currently there is no framework to capture the details of NDU in the depository system as these happen outside the depository system. Therefore, in order to enable the shareholders to record the NDUs in the depository system, it has been decided to permit the depositories to offer a system for capturing and recording the NDUs. The following are the guidelines-

1. NDUs are typically undertakings given by a shareholder not to transfer or otherwise alienate the securities and are in the nature of negative lien given in favour of another party, usually a lender.
2. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, requires promoters of a company to disclose details of their encumbered shares including NDUs by promoters which are covered under the scope of disclosures of 'Encumbrances'.
3. The depositories shall now-
 - a. Develop a separate module/ transaction type in their system for recording NDUs.
 - b. Both parties to the NDU shall have a demat account with the same depository and be KYC compliant.
 - c. Pursuant to entering the NDU, the Beneficial Owner (“**BO**”) along with the other party shall make an application through the participant (where the BO holds his securities) to the depository, for the purpose of recording the NDU transaction.
 - d. The application shall necessarily include details of BO ID, PAN, email-id, signature (s), name of the entity in whose favor such NDU is entered and the quantity of securities.
 - e. Such entity in whose favor NDU is entered shall also authorize the participant of the BO holding the shares, to access the signatures as recorded in that entity’s demat account.
 - f. The participant after being satisfied that the securities are available for NDU shall record NDU and freeze for debit the requisite quantity of securities under NDU



in the depository system.

- g. The depositories shall make suitable provisions for capturing the details of BO ID and PAN of the entity in whose favor such NDU is entered by the participant.
 - h. On creation of freeze in the depository system, the depository/ participant of the BO holding shares shall inform both parties of the NDU regarding creation of freeze under NDU.
 - i. Once the freeze for debits is created under the NDU for a particular quantity of shares, the depository shall not facilitate or effect any transfer, pledge, hypothecation, lending, rematerialisation or in any manner alienate or otherwise allow dealing in the shares held under NDU till receipt of instructions from both parties for the cancellation of NDU.
 - j. On unfreeze of shares upon termination/ cancellation of NDU, the depository shall inform both parties of the NDU in the form and manner agreed upon at the time of creating the freeze. The unfreeze shall be effected in the depository system after a cooling period of two (2) clear business days but no later than four (4) clear business days.
4. The freeze and unfreeze instructions executed by the Participant for recording NDUs will be subject to 100% concurrent audit.
 5. The Depositories shall not facilitate or be a party to any NDU outside the depository system as outlined herein. Other details are mentioned in the NDU Registration Circular.

Effects of non-compliance of *SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009*

SEBI vide its *Circular dated June 15, 2017* has provided the fines and directions for non-compliance with certain provisions of *SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009* (“**ICDR Regulations**”). Stock exchanges shall impose fines on the companies for non-compliance with certain provisions of ICDR Regulations as under-

1. Delay in completion of bonus issue- Regulation 95 (1). Fine-
 - a. Rs.20,000 (Rupees Twenty thousand) per day of non-compliance till the date of compliance.
 - b. If non-compliance continues for more than fifteen (15) days, additional fine of 0.01 % of paid up capital of the entity or Rs. 1,00,00,000 (Rupees One Crore) whichever is less. Paid-up capital for this purpose shall be the paid up capital as on first day of the financial year in which the non-compliance occurs.
2. With respect to bonus issue delays:
 - a. For the purpose of a bonus issue to be considered as ‘implemented’ under Regulation 95(1) of ICDR Regulations, the date of commencement of trading shall be considered.
 - b. The recognized stock exchange shall grant approvals to the bonus shares allotted to persons other than the promoter(s) in the interest of the investors, subject to compliance with other requirements.
 - c. The approvals for the promoters' bonus shares may be granted by the Stock Exchange after payment of the requisite fine by the company.
3. Companies not allotting the shares on conversion of convertible securities within 18 months- Regulation 75. Fine-
Same as 1 above
4. Issuer not approaching the exchange for listing of equity shares within 20 days from date of allotment-Regulation 108(2). Fine-
Same as 1 above





5. The amount of fine realized as per the above shall be credited to the 'Investor Protection Fund' of the concerned recognized stock exchange.
 6. The recognized stock exchange shall issue notice to the non-compliant listed entity to pay fine within fifteen (15) days from the date of the notice.
 7. If any non-compliant listed entity fails to pay the fine, the recognized stock exchange may initiate appropriate enforcement action, including prosecution.
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Guidelines for Investor Protection Fund, Investor Service Fund and its related matters at National Commodity Derivatives Exchanges

SEBI vide its *Circular dated June 13, 2017* has provided comprehensive guidelines for Investor Protection Fund, Investor Service Fund and its related matters at National Commodity Derivatives Exchanges (“**Exchanges**”). Earlier SEBI vide its *Circular dated September 26, 2016* (“**September 2016 Circular**”) had consolidated various norms and guidelines relating to Investor Protection Fund, issued by the erstwhile FMC, applicable to the Exchanges. Certain Clauses of the September 2016 have now been amended as below-

1. Contribution to the IPF

Clause 4.1. shall be substituted the following-

- 4.1. All the penalties levied and collected by the exchange, except for the settlement related penalties (including penalties from delivery default), shall be credited of the IPF.
- 4.2. 1% of the turnover fee charged by the exchange from its members/brokers or ten lakh whichever is higher in a financial year.

2. Eligibility of claims

a. Clause 6.2. shall be substituted the following-

6.2. If any eligible claim arises within three years from the date of expiry of the specified period, such claim

- i. shall be considered eligible for compensation from IPF/CPF in case where the defaulter member’s funds are inadequate. In such cases, IPF/CPF Trust shall satisfy itself that such claim could not have been filed during the specified period for reasons beyond the control of the claimant.
- ii. shall not be considered eligible for compensation from IPF/CPF in case where the surplus funds of the defaulter member is returned to the defaulter member. The same shall be borne by the exchanges after scrutinizing and satisfying itself that such claim could not have been filed during the specified period for reasons beyond the control of the claimant.





Provided that any claim received after three years from the date of expiry of the specified period may be dealt with as a civil dispute.

- b. Clause 6.3. shall be deleted
- c. Clause 6.4. shall be substituted the following-

6.4. The investor claim arising out of a default of a broker/member of the exchange shall be eligible for compensation from IPF.

The other amendments have been explained in detail in the link given below-

SEBI circular dated June 13, 2017 for provided comprehensive guidelines for Investor Protection Fund, Investor Service Fund and its related matters at National Commodity Derivatives Exchanges.

Participation of NRIs in ETCD segment

SEBI vide its *Circular dated June 28, 2017* has provided for directions for participation of Non Resident Indians (“NRIs”) in the Exchange Traded Currency Derivatives (“ETCD”) segment. NRIs are now permitted to trade in the currency derivatives segment of stock exchanges, subject to terms and conditions mentioned in the *RBI Circular dated February 02, 2017 (“RBI February Circular”)*. The directions and conditions are set out as follows-



1. NRIs shall designate an Authorised Dealer Category-I bank who is also a clearing member of the stock exchange / clearing corporation for the purpose of monitoring and reporting their combined positions in the Over the Counter (“OTC”) and ETCD segments.
2. NRIs may take positions in the currency futures / exchange traded options market to hedge the currency risk on the market value of their permissible under FEMA, 1999, Rupee investments in debt and equity and dividend due and balances held in Non Resident Rupee (“NRE”) accounts.
3. The onus of complying with the relevant provisions of the RBI February Circular shall rest with the NRI and in case of any contravention, the NRI shall render itself liable to any action that may be warranted by RBI as per the provisions of Foreign Exchange Management Act, 1999.

Currency Pair	Position limits
USD-INR	Gross open position across all contracts shall not exceed 6% of the total open interest or USD 10 million, whichever is higher.
EUR-INR	Gross open position across all contracts shall not exceed 6% of the total open interest or EUR 5 million, whichever is higher
GBP-INR	Gross open position across all contracts shall not exceed 6% of the total open interest or GBP 5 million, whichever is higher.
JPY-INR	Gross open position across all contracts shall not exceed 6% of the total open interest or JPY 200 million, whichever is higher.

RERA

MahaRERA

Self Declaration to be submitted by Promoters to the Bank



The promoter under section 4(2)(1)(D) of the Real Estate (Regulation and Development) Act, 2016 (“**Act**”) is required to deposit seventy per cent (70%) of the amounts realized for the real estate project from the allottees in a separate account to be maintained in a scheduled bank. Further, the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant (“**CA**”) in practice that the withdrawal is in proportion to the percentage of completion of the project (“**Withdrawal Certificate**”).

The promoter is also required to get his separate account audited within six (6) months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such CA.

The promoter was also required to submit such Withdrawal Certificates to the scheduled bank operating the separate account, for the purpose of withdrawal from time to time. Maharashtra Real Estate Regulatory Authority (“**MahaRERA**”) vide its *Circular dated June 7, 2017* (“**Self Declaration Circular**”) has now provided that the promoters would now have to submit self- declaration to the bank once every quarter to withdraw the amounts from the separate account, as the Withdrawal Certificates would be necessary to be retained with the promoter for the purpose of auditing. The format for self- declaration to be given by promoters is provided in the Self Declaration Circular.

Clarification on Calculation of Carpet area as defined under section 2(k) of the Real Estate (Regulation and Development) Act, 2016

Section 2(k) of the Act defines carpet area as net usable floor area of an apartment, excluding the area covered by the external walls, area under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but including the area covered by the internal partition walls of the Apartment.

The *Clarification dated June 14, 2017* ("**June 14 Clarification**") issued by MahaRERA has provided the meaning of the terms 'internal partition walls' and 'external walls'. Details of the same are provided in the June 14 Clarification.

Clarification regarding the period within promoter has to transfer the title by executing conveyance

A Clarification has been given by *Order No. 4 dated June 27, 2017* regarding the period within promoter has to transfer the title by executing conveyance.

Under MahaRERA

It is clarified that the relevant Section 17 of the Act would apply to all agreements for sale executed post May 01, 2017 irrespective of whether the projects require registration under RERA or not. Section 17 of the Act provides that the promoter shall execute a registered conveyance deed in favour of the allottee within specified period as per sanctioned plans as provided under the local laws. In absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under section shall be carried out by the promoter within three (3) months from date of issue of occupancy certificate.

Under MOFA, 1963

Any other sale agreements executed before May 01, 2017 would be governed by the relevant sections of the Maharashtra Ownerships Flat Act, 1963 ("**MOFA**"). Section 11 of MOFA states transfer of title to the society would be in accordance of the agreement executed and in absence of any such agreement, the deed of conveyance would have to be executed within four (4) months from the date of which the co-operative society is

Insolvency and Bankruptcy Board of India

The Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017

The Insolvency and Bankruptcy Board of India (“IBBI”) has by the virtue of powers vested in it by Section 196 of the Insolvency and Bankruptcy Code, 2016 (“Code”) and under Chapter VI Inspection And Investigation of the Code can carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities. IBBI vide a Notification dated June 12, 2017 has notified the Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017. The detailed Regulations have been given in the link below-

The Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017

The Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017

The IBBI vide its Notification dated June 14, 2017 has notified the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 for carrying out the fast track corporate insolvency resolution process in accordance with Chapter IV of part II.

A Corporate Insolvency Resolution Process (“CIRP”) carried out in accordance with Chapter IV of part II of the Code shall be called as fast track corporate insolvency resolution process. An application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors, namely:—

- a. a corporate debtor with assets and income below a level as may be notified by the Central Government; or
- b. a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or
- c. such other category of corporate persons as may be notified by the Central Government.

The fast track corporate insolvency resolution process shall be completed within a period of ninety (90) days from the insolvency commencement date subject to some mentioned conditions in the Code. The detailed Regulations have been given in the link below-

The Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017

Order of Hon'ble NCLT in matter of Section 10 of Insolvency and Bankruptcy Code, 2016 of Leo Duct Engineers & Consultants Limited

1. The Petitioner Leo Duct Engineers & Consultants Limited ("**Corporate Debtor**" / "**Applicant**") had filed an Petition for initiation of Insolvency Resolution Process under the provision of Section 10 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") before the Hon'ble National Company Law Tribunal Mumbai Bench ("**NCLT**").

2. Background:

The Corporate Debtor were unable to liquidate its huge outstanding liabilities which was to the tune of Rs. 32,00,00,000 (Rupees Thirty Two Crores) approximately and were in default towards their Financial Creditors i.e. Canara Bank and Standard Chartered Bank ("**Corporate Creditors**" / "**Banks**"). To avail the loan/credit facilities from the Banks, the Corporate Debtor had its immovable properties as securities and also the personal guarantees of its Directors and others, mortgaging several immovable properties in favor of the Banks.

3. The Banks had argued that the proceedings had already been initiated against the Petitioner under the relevant provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI**") and the immovable properties of the Corporate Debtor were to be repossessed on the day of filing of Petition and the Petition was filed only to get a moratorium in terms of section 14 of the Code and to stop the proceedings under SARFAESI.

3. NCLT's Ruling and its Analysis-

a. NCLT observed that the Corporate Debtors had only filed the Petition to stall the proceedings under the SARFAESI and to secure the immovable personal properties of the directors and the guarantors. The Hon'ble Tribunal stated that the Petition was only filed because in the resolution process under the Code, the personal properties would neither be seized, attached nor repossessed, as the resolution professional would only be concerned about the assets of the Corporate Debtor or any immovable property in its name and that the direction for imposing a moratorium would suit the directors and the guarantors perfectly from being dispossessed from their immovable properties.



- b. The Hon'ble Tribunal while refusing to initiate the Insolvency Resolution Process under section 10 of the Code and dismissing the Petition observed that -

"It is not sufficient just to meet the requirements under sec. 10 of the Code which would automatically entitle the Corporate Debtor to initiate such proceedings. Surely it could never have been the intention of the legislature to provide relief to defaulters of the Banks by taking refuge under this Code. The Adjudicating Authority has to consider the merits of each case and see beyond what meets the eye, and only after due application of mind, consider the case on its merits."



Order of NCLAT- P.K. Ores Private Limited Vs Tractors India Private Limited

1. The Appeal of was filed before the Hon'ble National Company Law Appellate Tribunal, New Delhi ("NCLAT") in case No.56 of 2017 by P.K. Ores Private Limited ("**Corporate Debtor**") against the order passed by NCLT on April 03, 2017.

2. Background

a. A notice under Section 8 of the Code was sent by Tractors India Private Limited ("**Corporate Creditor**") with a copy of a petition under Section 9 of the Code to the Corporate Debtor. No reply was received from Corporate Debtor.

b. The application was then admitted and then taken up by NCLT on various dates. However no notice of admission of the same was sent to the Corporate Debtor by NCLT as required. At a later stage when the counsel for the Corporate Debtor appeared.

3. NCLAT's Ruling and its Analysis-

a. NCLAT stated that there was nothing on record to suggest that a notice before the admission of the Corporate Creditor's application under Section 9 of the Code was sent to Corporate Debtor.

b. While observing that NCLT's actions were not in line with Section 424 of the Companies Act, 2013 and NCLT was required to notify the Corporate Debtor before admission of application under Section 9, NCLAT held that-

"As per Section 424 of the Companies Act, 2013 the Adjudicating Authority is supposed to follow the rules of natural justice before passing any order. In "Innoventive Industries Limited vs. ICICI Bank" Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017 this Appellate Tribunal by judgment dated 15th May, 2017, also held that a notice required to be given to the Corporate Debtor before admitting any application for initiation of corporate resolution process under Section 7 and 9 of the I&B Code."



4. NCLAT also held that according to the communication between the Corporate Debtor and the Corporate Creditor the Corporate Debtor had brought to Corporate Creditor's notice about some quality defect in the goods supplied by Corporate Creditor and this could be termed as existence of a dispute or dispute as held in "Kirusa Software Private Ltd. Vs Mobilox Innovations Private Ltd" Company Appeal (AT) (Insolvency) No. 6 of 2017.

 4. It was held that the application under Section 9 by Corporate Creditor was not maintainable and the order passed by NCLT was set aside.
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Warm Regards,

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